ORIGINAL

EX PARTE OR LATE FILED

COVAD

600 14th Street NW Suite 750 Washington , D.C. 20005
W > www.covad.com

T > 202.220.0400
F > 202.220.0401

**Jason D. Oxman**
**Assistant General Counsel**

4 September 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Re: CC Docket No. 96-98

Dear Ms. Salas:

On September 4, 2001, the undersigned, on behalf of Covad Communications Company (Covad), met with Cathy Carpino, Renee Crittendon, and Ben Childers of the Common Carrier Bureau in reference to the above-captioned docket. Specifically, Covad presented its views regarding the importance of the adoption of federal UNE provisioning intervals and associated penalties for noncompliance.

Because of the lack of specific, enforceable federal rules requiring incumbent LECs to provision functioning loops to requesting carriers in a timely manner, incumbents have been given a five-year free pass to deny, delay, and degrade the loops they provide to competitive LECs. A loop provisioned a month late is no better than a loop never provisioned at all. No customer is going to await service for so long, especially when another option – retail broadband service from the very same incumbent LEC that denied a timely wholesale loop – is usually available in a matter of days. Moreover, the death of competitive data providers is evidence that the BOCs have successfully out waited the capitalization of these competitors through a variety of tactics including egregious provisioning delays.

When the Commission first adopted its loop unbundling rules in 1996, it did not adopt specific provisioning intervals, but rather noted "it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry."[1] One of most pervasive ILEC maneuvers around the current federal rules is the timeliness of loop provisioning.[2] As the Commission first concluded in 1996, "national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents."[3] Nationwide carriers like Covad need concrete, specific UNE provisioning rules and associated penalties, in order to be able to serve customers in dozens of states across the country. The Bell companies, who do not compete outside of their regions, do not. Guess which group of carriers supports adoption of concrete, procompetitive nationwide UNE provisioning requirements?

Covad agrees with WorldCom that the Commission need only adopt a few, simple performance intervals in order to assure (for the first time) that competitive LECs will have timely access to wholesale services. Because WorldCom's advocacy in this docket has been focused on special access provisioning, Covad submits this *ex parte* letter to urge the Commission to seek comment specifically on the adoption of UNE performance intervals and associated penalties. The Commission has jurisdiction to do so (indeed, its jurisdiction in the UNE arena is stronger than in the special access arena), it will further

---

[1] *Local Competition First Report and Order* at para. 58.

[2] The clearest evidence of the dysfunction in the Commission's loop enforcement process is that incumbent LECs support it. For example, in comments filed in opposition to the ALTS loop petition last year, GTE argued that allegations of anticompetitive loop provisioning practices "are best dealt with through the complaint process." GTE Comments at 3. SBC stated in its comments that "the proper remedy is a complaint with the state commission or the FCC". SBC Comments at 24. Why are the BOCs unanimous in their preference for existing rules and procedures? Because those procedures virtually guarantee, based on a five year, zero-enforcement record of the FCC, that the BOCs will never face any penalty for their discriminatory loop practices.

the Commission's commitment to facilities-based competition, and the Commission will provide nationwide regulatory certainty in an area that is currently a jumble of inconsistent requirements.

Jurisdiction

Section 251(c)(3) of the Act requires incumbent LECs to provide access to unbundled network elements, such as UNEs, pursuant to "rates, terms and conditions" that are "just, reasonable and nondiscriminatory." Incumbent LECs generally focus on the "nondiscriminatory" language of section 251(c)(3) and argue that no regulator can impose any obligation that requires UNE performance any *better* than the ILECs provide their own retail customers. The plain language of section 251(c)(3) clearly provides otherwise. The "just and reasonable" language of section 251(c)(3) is not mere surplussage – indeed, it imposes a separate and distinct legal obligation on the ILECs. Indeed, were that additional obligation not there, incumbent LECs that did not offer a particular service would claim no obligation to provide UNEs in a timely manner. For example, incumbent LECs do not offer xDSL services over standalone loops, but rather provide such retail services solely via linesharing. As a result, the "nondiscrimination" language of section 251(c)(3) is insufficient, by itself, to ensure provisioning of standalone DSL-capable loops to Covad. Fortunately, Congress ensured that ILEC wholesale services would be subject to an independent legal requirement, tied to an objective standard to be interpreted by the FCC. The "just and reasonable" requirement of section 251(c)(3) empowers the Commission to exercise its authority as the expert

---

[3] *Local Competition First Report and Order* at para. 56.

agency to promulgate concrete UNE intervals and penalties to further the requirements of, and ensure compliance with, the statute.[4]

For a facilities-based provider like Covad, timely access to loops is the most important element of service provisioning. Covad cannot promise its ISP customers or its end users that service will be delivered in a uniform, timely manner, because of the inconsistent loop provisioning practices of the incumbent LECs. Thus, Covad could not market a guaranteed timely service interval in the New York metropolitan area, because the UNEs it gets in New York, northern New Jersey, and Connecticut, are subject to different regulatory regimes. Why is this? Because the FCC has never adopted national UNE rules.

Although it is certainly true that some state commissions have adopted loop provisioning intervals, the fact remains that the overwhelming majority of state commissions have not done so, and those that have done so have put different standards in place. As a practical matter, the policies of the different states – ranging from very pro-competitive intervals to no intervals at all – make service offerings extremely difficult for a national provider like Covad. As a result of the lack of a federal rule, Covad's quality of service varies on a state-by-state, ILEC-by-ILEC basis to take account of the widely different provisioning intervals put in place across different states.

As the Commission noted in 1996 in the *First Local Competition Report and Order*, the adoption of uniform national unbundling rules is particularly pro-competitive, because it reduces "the likelihood of potentially inconsistent determinations by state commissions" and thus reduces "burdens on new entrants that seek to provide service on

[4] The Commission also has ample common carrier jurisdiction, pursuant to sections 201 and 202 of the Act, to promulgate rules that ensure that all "practices" of the incumbent LECs are "just and reasonable." 47

a regional or national basis by limiting their need for separate network configurations and marketing strategies, and by increasing predictability."[5] The Commission recognized that state commissions have an important role in adopting rules that "take into account local concerns," but in the case of loop provisioning intervals, there are no such concerns.[6] With regard to xDSL-capable loops in particular, it is indeed entirely within the Commission's authority and responsibilities to ensure that *purchasers* of interstate telecommunications services and elements receive a certain minimum level of service quality from the incumbent LEC—because the incumbent LEC clearly has market power and degradation of service quality is one of the "classic" methods in which a firm with market power may seek to exercise that power.

Covad supports the performance metrics proposed by WorldCom in its *ex parte* submission to the Commission.[7] As those metrics were submitted to support the adoption of special access intervals, Covad suggests that the Commission expand those proposed metrics to cover, at minimum, two crucial UNE areas: provisioning, and repair and maintenance.[8] The Commission should consider adopting self-executing intervals, and associated penalties, for standalone UNE loops, linesharing UNEs, and interoffice transport – the core of the ILEC monopoly network, and the crucial inputs for any facilities-based CLEC.

---

U.S.C. sec. 201.

[5] *Local Competition First Report and Order* at para. 47. Of course, even then the incumbent LECs fought hard against the implementation of ANY national rules. BellSouth, for example, "urge[d] the Commission merely to codify the language of the 1996 Act." *Id.* at para. 50.

[6] *Local Competition First Report and Order* at para. 53.

[7] *See* "ILEC PERFORMANCE MEASUREMENTS & STANDARDS in the Ordering, Provisioning, and Maintenance & Repair of Access Service, National Carrier Management and Initiatives," issued June 26, 2001.

[8] The Commission should, obviously, solicit comment on what other areas of UNE performance should be subject to national performance rules and penalties, and indeed Covad looks forward to the opportunity to comment further and in greater detail on such issues.

In the first instance, the Commission must ensure that ILEC reporting on its performance, and payment of penalties, is not solely with the control of the ILEC itself. As certain Bell companies have demonstrated repeatedly to the Commission, the process of self-reporting performance and penalties is not always completed accurately if undertaken without proper supervision. As such, the Commission must explore requiring an independent third party to oversee the process and ensure accuracy and timeliness of payment of penalties. Second, the Commission must ensure that those payments are made to the aggrieved carrier (not the U.S. Treasury) on a monthly basis in the form of bill credits, which takes advantage of the existing billing relationship between ILEC and CLEC and thus requires no new systems.[9] Finally, the Commission must ensure that the underlying performance data is available to the FCC, independent auditors, and aggrieved carriers, which will help protect against inaccurate performance reporting

Stand-alone loops

In the *Line Sharing Order*, the Commission cited with approval the provisioning interval adopted by the Texas PUC of 3 business days for standalone xDSL-capable loops.[10] This interval is more than sufficient time for incumbent LECs to provision a loop, especially if the incumbents cease delaying the implementation of electronic pre-order and order capabilities. When the loop requires conditioning, and the competitive

[9] For a standalone loop that is provisioned late, for example, the Commission should require incumbent LECs to refund the nonrecurring charges for that loop, and pay an additional $50 per loop per day for the delayed loop.

[10] We note that the Texas Commission requires that the incumbent LEC provision 95 percent of xDSL orders within 3 business days (for 1-10 loops), 7 business days (11-20 loops) and 10 business days (20+ loops). In Texas, this provisioning interval runs from the application date to completion date for new, terminating, and change orders. The application date is the day that the requesting carrier authorizes the incumbent to provision the xDSL capable loop based on the loop qualification. The completion date is the day that the incumbent completes the service order activity. *See* Linesharing Order, FCC 99-355, at para. 174.

LEC requests such conditioning, the loop interval should be 10 business days so as to permit the incumbent to complete such conditioning activities as are necessary.

Linesharing

The Illinois Commerce Commission recently adopted a linesharing UNE provisioning interval of one business day.[11] That interval recognizes the very minimal amount of provisioning work that an ILEC must perform to provision a linesharing UNE. Because the loop over which the DSL lineshared service will be provided is already in service and working, the ILEC need only complete simple cross-connect work in the central office to provision the UNE. One business day is more than sufficient for the ILEC to complete the (literally) few minutes of work required to provision linesharing.

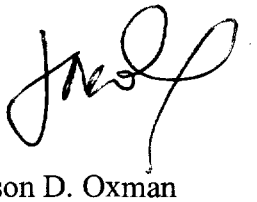
Conclusion

The Commission has ample authority to require incumbent LECs to provide UNEs in a concrete and specific time frame, and indeed the Commission's failure to ensure timely delivery of UNEs makes unbundling rules virtually meaningless. The Commission's dedication to ensuring that facilities-based competitors are able to compete effectively against their incumbent LEC competitors must take account of the fact that those competitors are also wholesale suppliers that have the powerful incentive and ability to delay competitor access to UNEs. Covad looks forward to providing the Commission further suggestions on the adoption of procompetitive UNE performance rules and associated penalties.

---

[11] Covad Communications Company Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois and for an Expedited Arbitration Award on Certain Core Issues, Docket No. 00-312, 00-0313 (Consol.), August 17, 2000 Arbitration Decision at 25-27; Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, Docket No. 00-0393, March 14, 2001 Order at 73 (requiring

Respectfully submitted,



Jason D. Oxman

cc:
Cathy Carpino
Renee Crittendon
Ben Childers
Kathy Farroba
Michelle Carey
Christopher Libertelli

---

Ameritech Illinois to tariff in Illinois 24 hour interval for line sharing loops not requiring conditioning, and 3 days for loops requiring conditioning established in Covad/Rhythms line sharing arbitration).